SUBJECT INDEX

	Page
Opinion of the Supreme Court and of the courts below	2
Jurisdiction	2
Questions presented	2
Statutes involved	4
Statement of the case	5
Argument	9
A. Reply to petitioner's contentions that this court should review the holding of the court of appeals that the District Court had no jurisdiction under 28 U. S. C. § 1337	9
B. Comment of respondent with respect to the contentions of the petitioner that the court of appeals on remand has decided questions of federal law which have not, but should be, settled by this court	12
C. Conclusion	15
Appendix A. Interstate Commerce Act	App. p. 1
Labor Management Relations Act (49 U. S. C. §§157, 158)	App. p. 2

TABLE OF AUTHORITIES CITED

Cases

Braswell Motor Freight Lines, Inc., et al. v. Pensick & Gordon, Inc. October Term, 1963, No. 625, Case No. 17380 ..... 8, 12, 15

Hewitt-Robins, Inc. v. Eastern Freightways, Inc., 371 U. S. 84, 9 L. ed 2d 142, 83 S. Ct. 157 ..... 7, 9, 10, 11

Meier & Pohlman Furniture Co. v. Gibbons, 233 F. 2d 296 9

Merchandise Warehouse Co. v. ABC Freight Forwarder Corp., 165 Fed. Supp. 67 9

T.I.M.E., Inc. v. United States, 359 U. S. 464 9, 10, 11

Statutes

Interstate Commerce Act, Part I, Sec. 8 10

Interstate Commerce Act, Part I, Sec. 9 10

Interstate Commerce Act, Part II, Secs. 201-227 4

Interstate Commerce Act, Part II, Sec. 216(b) 2, 3, 5, 6, 10

Interstate Commerce Act, Part II, Sec. 216(d) 2, 3, 5, 6, 10

Interstate Commerce Act, Part II, Sec. 216(j) 5, 11

Interstate Commerce Act, Part IV, Secs. 401-422 4

Interstate Commerce Act, Part IV, Sec. 404(a) 3, 5

Interstate Commerce Act, Part IV, Sec. 404(b) 3, 5

Labor Management Relations Act, Sec. 7 5

Labor Management Relations Act, Sec. 8..... 5

United States Code, Title 28, Sec. 1332 6

United States Code, Title 28, Sec. 1337 .....6, 10

Page

United States Code, Title 29, Secs. 141-187 5

United States Code Annotated, Title 29, Sec. 141 4

United States Code Annotated, Title 29, Secs. 157-158 5

United States Code Annotated, Title 49, Secs. 301-307 4

United States Code Annotated, Title 49, Sec. 316(b) 2, 3, 5

United States Code Annotated, Title 49, Sec. 316(d) 3, 5

United States Code Annotated, Title 49, Sec. 316(j) 5

United States Code Annotated, Title 49, Secs. 1001-1022 4

United States Code Annotated, Title 49, Sec. 1004-(a) 3, 5

United States Code Annotated, Title 49, Sec. 1004-(b) 3, 5

IN THE

Supreme Court of the United States

October Term 1963
No. 645

Case No. 17235

PENSICK & GORDON, INC.,

Petitioner,

vs.

CALIFORNIA MOTOR EXPRESS, *et al.*,

Respondents.

Case No. 17380

PENSICK & GORDON, INC., a California corporation,

Petitioner,

vs.

CALIFORNIA MOTOR EXPRESS, LIMITED, a corporation, *et al.*,

Respondents.

Brief of Respondents California Motor Express, Ltd., Delta Lines, Inc., Desert Express, Merchants Express of California, Valley Motor Lines, Inc., and Western Truck Lines, Ltd., Appellees No. 17235, and Braswell Motor Freight Lines, Inc., Denver Chicago Trucking Co., Inc., Hopper Truck Lines, Illinois-California Express, Inc., Universal Carloading & Distributing Co., Inc., Republic Carloading & Distributing Co., Inc., National Carloading Corporation, Western Carloading Co., and Acme Fast Freight, Inc., Appellees No. 17380.

In Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinion of the Supreme Court and of the Courts Below.

The opinions of the Court of Appeals in these causes are reported in 302 F. 2d 391 (April, 1962) and 323 F. 2d 769 (September, 1963). The causes have been the subject of prior opinion by the Supreme Court reported at 371 U. S. 184, 9 L. Ed. 2d 227, 83 S. Ct. 265 (1962). Opinions of the Court of Appeals above described are reproduced as Appendix A and Appendix D of the Petition. The prior opinion of this Court is reproduced as Appendix C of the Petition.

These respondents who are parties to Case No. 17380 filed a Petition for Writ of Certiorari entitled Braswell Motor Freight Lines, Inc., et al. v. Pensick & Gordon, Inc., October Term, 1963, No. 625, seeking review of the decision of the Court of Appeals for the Ninth Circuit.

Jurisdiction.

Respondents concur with the Statement of Petitioners as to jurisdiction of the Supreme Court and the Court of Appeals. The jurisdiction of the District Court to hear and determine the controversies is the matter at issue in both No. 17235 and No. 17380.

Questions Presented.

These Respondents are dissatisfied with the statement of the questions as presented by the Petitioner.

The Court of Appeals has approved the action of the District Court dismissing the cause as to all defendants in Case No. 17235; therefore, the only question presented in that case is:

> Do Sections 216(b) and (d) of the Interstate Commerce Act, Part II (49 U.S.C.A. §§ 316(b)

and (d) establish a private legal right in a shipper, justiciable in the District Court, for the reparation of injury allegedly resulting from past unreasonable and unjust discrimination in service by motor common carriers in interstate commerce?

Respondents submit that the questions presented by the decision of the Court of Appeals as it relates to the Respondents who are parties to Case No. 17380 are these:

1. Do Sections 216(b) and (d) of the Interstate Commerce Act, Part II (49 U. S. C. A. §§316-(b) and (d)) establish a private legal right in a shipper, justiciable in the District Court, for the reparation of injury allegedly resulting from past unreasonable and unjust discrimination in service by motor common carriers in interstate commerce?
2. Do Sections 404(a) and (b) of the Interstate Commerce Act, Part IV (49 U. S. C. A. §§1004(a) and (b)) establish a private legal right in a shipper, justiciable in the District Court, for the reparation of injury allegedly resulting from past unreasonable and unjust discrimination in service by freight forwarders in interstate commerce?
3. Does a post-shipment action for damages predicated upon a claim of a shipper that failure of common carriers by motor vehicle in interstate commerce to render pickup and delivery service across picket lines at shipper's place of business constitutes unjust and unreasonable discrimination in service survive enactment of the Interstate Commerce Act Part II?

4. Does a post-shipment action for damages predicated upon a claim of a shipper that failure of freight forwarders in interstate commerce to render pickup and delivery service across picket lines at shipper's place of business constitutes unjust and unreasonable discrimination in service survive enactment of the Interstate Commerce Act, Part IV?

5. Assuming jurisdiction of the District Court over the action, may the District Court seek and the Interstate Commerce Commission give an advisory opinion as to whether the carrier's conduct in failing to provide pickup and delivery service across picket lines constitutes an unjust and unreasonable discrimination in service?

6. In jurisdiction of the District Court in the particular controversy pre-empted by that of the National Labor Relations Board under the Labor Management Relations Act, 29 U. S. C. A. §§141 *et seq.*?

7. Assuming jurisdiction of the United States District Court is not so pre-empted, may the District Court see and the National Labor Relations Board give an advisory opinion as to whether any activity of any person pertinent to the determination of the action is protected or prohibited by the National Labor Relations Act as amended?

Statutes Involved.

"The petition presents questions of the Congressional intent in the enactment of the Interstate Commerce Act, Part II Sections 201-227 (49 U. S. C. A. §§301-307) Interstate Commerce Act, Part IV Sections 401-422 (49 U. S. C. A. §§1001-1022 and the Labor

Management Relations Act, (29 U. S. C. §§141-187). Therefore, in some measure, all of each of the above cited provisions has pertinence. For convenience of reference these statutes will be referred to in subsequent parts of the Petition of this reply as the "Motor Carrier Act," the "Freight Forwarder Act" and the "Labor Management Act," respectively. Provisions of these statutes most directly involved are Interstate Commerce Act, Part II, Sections 216(b), 216(d) and 216(j); U. S. C. A. §§316(b) (d) and (j)), Interstate Commerce Act, Part IV, Sections 404(a), 404(b), (49 U. S. C. A. §§1004(a) (b)) and Labor Management Relations Act, Sections 7 and 8 (29 U. S. C. A. §§157, 158). Interstate Commerce Act, Part II, Sections 216(b), 216(d) and 216(j) are reproduced at pages 6 and 7 of the Petition and will not, therefore, be restated here. Interstate Commerce Act, Part IV Sections 404(a), 404(b) and Labor Management Relations Act Sections 7 and 8 are reproduced herein as Appendix A hereof.

Statement of the Case.

Respondents cannot agree with Petitioner's statement of the case. Set forth below is a revised statement which Respondents believe to be more accurate and complete than that set forth in the Petition.

Plaintiff, a wholesale distributor of toys, sells its merchandise to retailers throughout Western United States. Plaintiff regularly and customarily calls upon common carriers to make pickup and delivery of property at plaintiff's location moving in interstate Commerce [1 Tr. 5, 6[1]]. For seven days in October, 1960, there

[1]References are to Volume and Pages of the Transcript of Record. "1 Tr." refers to Transcript in Case No. 17235, "2 Tr." refers to Transcript in Case No. 17380.

was a strike of plaintiff's employees during which the Teamsters Union maintained a picket line at plaintiff's place of business [1 Tr. 40, 42, 174; 2 Tr. 80, 86]. Driver employees of the Respondents (and other common carriers), members of the Teamsters, declined to pass from public streets through the picket line to accomplish pickup or delivery of shipments at the loading platform on plaintiff's premises [1 Tr. 28-30, 40-41, 65-66; Tr. 78-79, 80-82]. All other aspects of carrier service were performed as requested.

The action is for damages predicated upon the claim that the failure of Respondents to accomplish pickup or delivery across picket lines during the strike period constitutes unjust and unreasonable discrimination in service by common carriers.

Those Respondents who are named in the original complaint and are parties in Case No. 17235 are all common carriers by motor vehicle under the Motor Carrier Act. Diversity not existing, jurisdiction as to them is claimed solely upon the basis of 28 U. S. C. §1337 on the premise that Motor Carrier Act, Sections 204(b) and (d) authorize a court action for damages for past unjust and unreasonable discriminations in service.

Jurisdiction is claimed as to the Respondents named in the amended complaint (the parties to Case No. 17380) under 28 U. S. C. §1337 and also on the additional grounds of diversity under 28 U. S. C. §1332

on the premise that a common law action for damages for past unjust and unreasonable discriminations in service survives passage of Parts II and IV of the Interstate Commerce Act.

The action was dismissed on both the original and amended complaints after motions of the defendants who are common carriers by motor vehicle challenging jurisdiction of the District Court both under the Motor Carrier Act and the Labor Management Relations Act. Plaintiff took separate Appeals from the orders of dismissal as to defendants named in the original and amended complaints. The cases were consolidated for consideration and decision by the Court of Appeals.

In its first opinion the Court of Appeals held the Motor Carrier Act did not create a statutory cause of action cognizable in the Federal courts and that survival of a common law action would be inconsistent with that Act's statutory purposes. The effect of the Labor Management Relations Act upon jurisdiction was not passed upon.

After grant of writ of certiorari, this Court, in a *per curiam* opinion, remanded the case to the Court of Appeals for further consideration in light of the decision in *Hewitt-Robins, Inc. v. Eastern Freightways, Inc.*, 371 U. S. 84, 9 L. ed. 2d 142, 83 S. Ct. 157 (1962).

In its opinion on remand the Court of Appeals has held as follows:

(1) That the first complaint, grounded in claimed violations of statutory right, was properly dismissed for lack of jurisdiction;

(2) That the Amended Complaint states a common law cause of action which survives passage of the Motor Carrier Act;

(3) That jurisdiction of the District Court is not preempted by that of the National Labor Relations Board under the Labor Management Relations Act;

(4) That the District Court can determine to what extent, if any, the common law right has been affected or qualified by the Motor Carrier Act or the Labor Relations Act; and

(5) That the District Court can refer or require references to the Interstate Commerce Commission or the National Labor Relations Board for such aid as may be necessary or useful to the Court's ultimate decision.

In *Braswell Motor Freight Lines, Inc., et al v. Pensick & Gordon, Inc.* October Term, 1963, No. 625, the Respondents who are parties to Case No. 17380 seek review of the holdings of the Court of Appeals on remand set forth in (2) through (5) above. Herein, Pensick & Gordon, Inc. seeks review of holdings (1), (4) and (5). Thus, all parties agree that review of the decision of the Court of Appeals is required and as to some of the holdings which should be considered on such review. Petitioner and Respondents differ only as to which of the remaining holdings it is necessary or appropriate for this Court to consider upon such review.

ARGUMENT.

A. Reply to Petitioner's Contentions That This Court Should Review the Holding of the Court of Appeals That the District Court Had No Jurisdiction Under 28 U. S. C. § 1337.

On remand the Court of Appeals confirmed its prior holding that the Motor Carrier Act does not create a statutory cause of action for damages for past discriminations in service. Dismissal as to all defendants who are parties to Case No. 17235 was, therefore, affirmed. This holding of the Court of Appeals was predicated upon the decision of this Court in *T.I.M.E., Inc. v. United States*, 359 U. S. 464 (1959) and the determination that *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U. S. 84 (1962) did not change the holding in *T.I.M.E., Inc.*

In support of the contention that the above described holding of the Court of Appeals should be reviewed the Petitioner urges: (1) that the decision is in conflict with decisions in other Circuits; and, (2) that there has been a misapplication of decisions of this Court.

The cases relied upon by Petition as establishing a conflict in decisions of Courts of Appeals are *Meier & Pohlman Furniture Co. v. Gibbons* 233 F. 2d 296, decided by the Court of Appeals for the Eighth Circuit in 1956, and *Merchandise Warehouse Co. v. ABC Freight Forwarder Corp.*, 165 Fed. Supp. 67, a 1958 decision of a District Court in the Southern District of Indiana. Both cases antedate the decision of this Court in *T.I.M.E., Inc.. supra.* Therefore, any such conflict as these earlier decisions might otherwise have created has already been resolved by this Court. In reality, neither of the cases cited by Petitioner is in conflict with the

challenged holding of the Court of Appeals in the case here involved. True, in each of the cases there is a declaration of jurisdiction in a federal district court predicated upon the assumption of the existence of a statutory right. However, in both cases the said right was presumed to exist without critical analysis and without any consideration of the Congressional intent and purpose in enactment of the Motor Carrier Act. Premises considered, no basis exists for review predicated on conflict in decisions of Courts of Appeals.

The contention of the Petitioner that in holding the District Court does not have jurisdiction under 28 U. S. C. §1337 the Court of Appeals has misapplied decisions of this Court is also without merit.

The burden of Petitioner's argument appears to be that, since the Court of Appeals has held survival of a common law action is not inconsistent with the statutory purpose on authority of *Hewitt-Robins*, Inc., it must also follow that *T.I.M.E., Inc.* cannot properly be held controlling on the issue of the existence of a statutory right of action.

In T.I.M.E., Inc., this Court held that Sections 216(b) and (d) of the Motor Carrier Act cannot be construed as establishing a statutory cause of action for enforcement of the duties therein imposed by private judicial actions for damages. The basis for this conclusion was that the Motor Carrier Act contains no provisions comparable to Sections 8 and 9 of Interstate

Commerce Act, Part I and that in 1949 and again in 1957 the Congress refused to adopt proposed amendments which would have specifically authorized such private judicial actions. The Motor Carrier Act provisions considered in *T.I.M.E., Inc.* are the same as those that are here involved. Petitioner tacitly concedes that the reasoning of *T.I.M.E., Inc.* is here pertinent but contends the holding in *T.I.M.E.* is no longer controlling by reason of the later decision of this Court in *Hewitt-Robins, Inc.*

The position of the Petitioner is not well taken. In *Hewitt-Robins, Inc.* there was diversity. The basis of decision was that the complaint stated a claim predicated on a pre-existing common law right which survived passage of the Motor Carrier Act because it was not inconsistent with the purposes of the act within the meaning of Section 216(j) thereof. Thus, as the Court of Appeals stated, *Hewitt-Robins* considered only the question of survival of the common law right there involved. Nothing therein can be read as holding that the Motor Carrier Act created a statutory cause of action or as disapproving in any way the prior holding in *T.I.M.E., Inc.* that such statutory right does not exist. In short, the Court of Appeals has followed and correctly applied the applicable decisions of this Court in its holding that the District Court has no jurisdiction over the action asserted against the parties who are Respondents in Case No. 17235.

B. Comment of Respondent With Respect to the Contentions of the Petitioner That the Court of Appeals on Remand Has Decided Questions of Federal Law Which Have Not, but Should Be, Settled by This Court.

In *Braswell Motor Freight, Inc., et al. v. Pensick & Gordon, Inc.*, October Term, 1963, No. 625, these Respondents who are parties to Case No. 17380 seek writ of certiorari on the basis, among others, that each of the following holdings of the Court of Appeals involve important questions of Federal law which have not been, but should be, settled by this Court:

1. The holding that the Amended Complaint states a common law cause of action which survives passage of the Motor Carrier Act;

2. The holding that jurisdiction of the District Court is not pre-empted by that of the National Labor Relations Board under the Labor Management Relations Act;

3. The holding that the District Court can determine to what extent, if any, the common law right has been affected or qualified by the Motor Carrier Act or the Labor Management Relations Act; and

4. The holding that the District Court can refer or require reference to the Interstate Commerce Commission or the National Labor Relations Board for such aid as may be necessary or useful to the Court's ultimate decision.

In the present posture of the case the Respondents who are parties to Case No. 17235 are not affected directly by any of the foregoing holdings of the Court

of Appeals. Said Respondents are, however, in agreement with those in Case No. 17380 that each of said holdings presents an important question of Federal law which has not been, but should be, settled by this Court.

Understandably, the Petitioners do not challenge directly the holdings of the Court of Appeals that a common law action survives and that the jurisdiction of the District Court is not pre-empted by reason of provisions of the Labor Management Relations Act. However, arguments put forward by Petitioners in support of the necessity for review of other holdings confirm the position of Respondents that the holdings of the Court of Appeals as to the survival of the common law action and pre-emption under the Labor Management Relations Act must be included in the list of issues requiring review of this Court.

Petitioner concedes that the Motor Carrier Act and the Labor Management Relations Act are comprehensive regulatory enactments and that consistent and nondiscriminatory treatments of those affected thereby are fundamental aims of both statutes. Petitioner also recognizes, and rightly so, that the holdings of the Court of Appeals that a common law action survives passage of the Motor Carrier Act and that jurisdiction of the Federal Court over the controversy is not pre-empted by reason of the provisions of the Labor Management Relations Act will inevitably create a situation in which both State and Federal Courts will be undertaking to determine to what carrier conduct is to be considered discriminatory, what activities of employers and employees are protected or proscribed under the Labor Management Relations Act and the even more significant decisions involved in striking a balance be-

tween impacts of apparently conflicting Federal statutes on the surviving common law action.

Petitioner urges the foregoing difficulties can be minimized by a judicial declaration that Congress intended by enactment of the Motor Carrier Act to create a statutory cause of action for damages cognizable in the Federal district courts. The contention is tacit admission that survival of a common law action is inconsistent with statutory purposes. Respondent respectfully suggests that the complete and only logical solution to the difficulties which stem from perpetuation of the common law action, is the recognition that said common law action is necessarily inconsistent with the statutory purposes and does not, therefore, survive. Both solutions indicate the necessity for review by this Court of the holding of the Court of Appeals that a common law action survives enactment of the Motor Carrier Act and that the District Court has jurisdiction notwithstanding the provisions of the Labor Management Relations Act.

The Court of Appeals has suggested that the difficulties of coordinating apparently conflicting Federal statutes and the pre-existing common law rights can be resolved either by judicial decision or by piecemeal reference of issues either to the Interstate Commerce Commission or to the National Labor Relations Board, or both, as the Court may deem appropriate. Both the difficulties and the cumbersome and unprecedented solutions suggested by the Court of Appeals for overcoming them arise solely because the Court of Appeals has held a common law action survives passage of the Motor Carrier Act and that jurisdiction of the District Court is not pre-empted by National Labor Relations

Board under the Labor Management Relations Act. All parties are in agreement that the specific solutions suggested by the Court of Appeals have no legal justification and that its holdings with respect thereto should be reviewed. All factors considered, it is apparent that such review must include re-evaluation of the validity of the holdings on the basic questions of survival of the common law action and pre-emption under the Labor Management Relations Act.

C. Conclusion.

Either directly or indirectly through arguments made in the petition, the Petitioner concedes that review of the decision of the Court of Appeals is required on all of the issues set forth in the petition for writ of certiorari heretofore filed by Respondents in Case No. 17380 in Braswell Motor Freight Lines, Inc., et al. v. Pensick & Gordon, Inc., No. 625, October Term, 1963. The only holding of the Court of Appeals not requiring review by this Court is the holding that the Motor Carrier Act does not create a statutory cause of action and that dismissal of the action as to the parties in Case No. 17235 was proper. All premises considered the writ should be granted in Case No. 17380 restricted to review of the holdings of the Court of Appeals on remand that—

(1) The Amended Complaint states a Cause of Action which survives enactment of the Motor Carrier Act;

(2) Jurisdiction of the District Court is Not preempted by that of the National Labor Relations Board under the Labor Management Relations Act;

(3) The District Court can determine to what extent, if any, the common law right has been affected or qualified by the Motor Carrier Act or the National Labor Relations Act; and

(4) The District Court can refer or require reference to the Interstate Commerce Commission or the National Labor Relations Board for such aid as may be necessary or useful to the Court's ultimate decision.

Procedurally, review so limited can best be accomplished by grant of the writ of certiorari as heretofore requested by certain of these Respondents in No. 625, October Term 1963.

Respectfully submitted,

CATLIN & CATLIN,
FRANK D. CATLIN,
GEORGE L. CATLIN,
Attorneys for Respondents,
Universal Carloading & Distributing Co., Inc.; Republic Carloading & Distributing Co., Inc.; National Carloading Corporation; Western Carloading Company; Acme Fast Freight, Inc.

RUSSELL & SCHUREMAN,
THEODORE W. RUSSELL,
Attorneys for Petitioners,
California Motor Express, Ltd.; Delta Lines, Inc; Desert Express; Merchants Express of California; Valley Motor Lines, Inc.; Western Truck Lines, Ltd.; Braswell Motor Freight Lines, Inc.; Denver-Chicago Trucking Co., Inc.; Hopper Truck Lines; Illinois-California Express, Inc.

APPENDIX A.

INTERSTATE COMMERCE ACT

Part IV

Sec. 404(a) It shall be the duty of every freight forwarder to provide and furnish, upon reasonable request therefore, the service subject to this chapter covered by its permit issued under this chapter, and to establish, observe, and enforce just and reasonable rates and charges therefor and just and reasonable classifications, regulations, and practices relating thereto and to the issuance, form, and substance of receipts and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation in service subject to this chapter, the facilities for such transportation, and all other matters relating to or connected with such transportation, and every unjust or unreasonable rate, charge, classification, regulation, or practice is prohibited and declared unlawful.

Sec. 404(b) It shall be unlawful for any freight forwarder, in service subject to this part, to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; Provided, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any carrier of whatever description.

LABOR MANAGEMENT RELATIONS ACT

(49 U. S. C. §§157, 158)

§157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the rignt to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *PROVIDED*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

organization: *PROVIDED*, that, nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *PROVIDED FURTHER*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *PROVIDED*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any good, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or

in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an

order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results

thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *PROVIDED*, That where there is in effect a collective

bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of

section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purpose of this subsection and subsection (b)-(4)(B) of this section the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufac-

turer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f). It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified appli-

cants for such employment, or (4) shall agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)-(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.